**Editor's note: Appealed -- aff'd, sub nom. Trapper Mining, Inc. v. Hodel, Civ.No. 88-1812 (D. Colo. Nov. 9, 1989), aff'd, No. 89-1372 (10th Cir. Jan. 15, 1991), 923 F.2d 774; petition for cert, No. 90-1940 (S.Ct. June 18, 1991), denied Oct. 7, 1991; 112 S.Ct. 81**

GENERAL ELECTRIC HOLDINGS, INC.
TRAPPER MINING, INC.

IBLA 86-1576, 88-156 Decided August 12, 1988

Appeals from decisions of the Colorado State Office, Bureau of Land Management, denying protests of notices to lessee of record of readjustment date for coal leases and proposed readjusted terms and conditions. C-07518,
C-07519.

Affirmed.

1. Coal Leases and Permits: Leases--Coal Leases and Permits: Readjustment

   For purposes of coal lease readjustment periods, any coal lease issued prior to enactment of sec. 6 of the Federal Coal Leasing Amendments Act of 1976, codified at 30 U.S.C. | 207 (1982), whose 20-year readjustment period expires after Aug. 4, 1976, is automatically converted at that time to a 10-year readjustment interval.

2. Coal Leases and Permits: Leases--Coal Leases and Permits: Readjustment

   BLM may incorporate language in a readjusted coal lease which makes termination of liability under the lease bond contingent on reclamation of all lands the surface of which has been disturbed, including land within a permit area, where Departmental regulations allow BLM, on its own or at the lessee's instigation, to release liability under the bond to the extent it covers reclamation obligations within a permit area.

APPEARANCES: Richard L. Fanyo, Esq., Denver, Colorado, for appellants; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

General Electric Holdings, Inc. (General Electric), and Trapper Mining, Inc. (Trapper), have appealed from two decisions of the Colorado

State Office, Bureau of Land Management (BLM). The first, dated July 16, 1986, denied their protest of a June 2, 1986, BLM notice informing General Electric, the lessee of record under coal leases C-07518 and C-07519, that the two leases would be readjusted "on June 1, 1988." 1/ The second, dated November 18, 1987, denied their protest of an August 5, 1987, BLM notice informing General Electric of the proposed readjusted terms and conditions for coal leases C-07518 and C-07519. The appeals were docketed as IBLA 86-1576 and IBLA 88-156, respectively. On February 29, 1988, General Electric and Trapper filed a motion to consolidate the two appeals.
Because the primary issue in both appeals is identical, we hereby consolidate the appeals for decision.

Effective June 1, 1958, BLM issued coal leases C-07518 and C-07519 to the Utah Construction Company, pursuant to section 2(a) and (b) of the Mineral Leasing Act, as amended, 30 U.S.C. | 201 (1958). At the time of issuance, section 7 of the Mineral Leasing Act, 30 U.S.C. | 207 (1958), provided that coal leases would be issued upon condition "that at the end
of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods." 2/ Subsequent to issuance of the two leases, the Utah Construction Company changed its name to Utah International.

By notice dated September 12, 1979, after the expiration of the
initial 20-year period following issuance of the leases, BLM informed
Utah International that it intended to readjust, in accordance with the Federal Coal Leasing Amendments Act of 1976 (FCLAA), P.L. 94-377, 90 Stat. 1083 (1976), the terms and conditions of the leases effective December 2, 1979. Utah International subsequently appealed to the Board from a February 11, 1980, BLM decision readjusting lease terms and conditions
effective December 1, 1979, as proposed, and denying Utah International's

1/ General Electric and Trapper, along with Utah International, Inc.
(Utah International), then the lessee of record under coal leases C-07518 and C-07519, originally appealed from a June 5, 1984, BLM decision which essentially restated BLM's position, expressed in an Aug. 3, 1982, notice, that the two leases would be subject to readjustment on June 1, 1988. Concluding that neither the June 1984 decision nor the August 1982 notice constituted a binding expression of BLM's intention to readjust the leases on June 1, 1988, thereby adversely affecting the appellants within the meaning of 43 CFR 4.410(a), we dismissed the appeal without prejudice in a Dec. 31, 1984, order (Utah International, Inc., IBLA 84-807).
2/ This statutory provision was incorporated into section 3(d) of the two coal leases (Form 4-696 (October 1956)), which reserved to the United States the

"right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period."

objections thereto. In Kaiser Steel Corp., 63 IBLA 363 (1982), relying on the opinion in Rosebud Coal Sales Co. v. Andrus, 667 F.2d 949 (10th Cir. 1982), the Board set aside a number of BLM decisions, including the February 1980 decision issued to Utah International, because BLM had failed to notify the lessees of record that BLM intended to readjust the terms and conditions of the leases prior to the expiration of the 20-year period following issuance of the leases, or prior to the expiration of a succeeding 20-year period. The Utah International case was remanded to BLM, which then issued an August 3, 1982, notice which stated: "As a result of the above-cited IBLA decision, the terms and conditions of coal leases C-07518 and C-07519 remain as issued effective June 1, 1958. Pursuant to regulation 43 CFR 3451.1(a)(1), these leases are subject to readjustment on June 1, 1988."

Effective April 1, 1983, BLM approved a sublease of coal leases C-07518 and C-07519 from Utah International to Trapper. Subsequently, BLM approved an assignment of the record title interest in the two coal leases from Utah International to General Electric, effective February 1, 1986. The record title interest which was transferred included all of Utah International's interests in the sublease to Trapper.

By notice dated June 2, 1986, BLM informed General Electric that coal leases C-07518 and C-07519 would be readjusted on June 1, 1988, stating:

> Notice is hereby given that the terms and conditions of the leases will be readjusted pursuant to Sec. 3(d) of each lease and the provisions of 43 CFR 3451. The proposed readjusted terms and conditions will be forwarded to you within two years of your receipt of this notice.

On July 2, 1986, General Electric and Trapper protested the June 1986 BLM notice, contending that the two coal leases would not become subject to readjustment until June 1, 1998, i.e., the expiration of the second 20-year period following issuance of the leases, in accordance with section 3(d) of the leases.

In its July 1986 decision, BLM denied the protest of General Electric and Trapper to the June 1986 BLM notice, concluding that coal leases C-07518 and C-07519 would be readjusted on June 1, 1988. BLM stated that this readjustment date, which was 10 years after the initial 20-year period following issuance of the leases, was in accordance with section 6 of FCLAA, which had amended section 7 of the Mineral Leasing Act, 30 U.S.C. | 207 (1982), on August 4, 1976. Section 6 of FCLAA provides that a coal lease "will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended." 30 U.S.C. | 207(a) (1982).

On October 2, 1987, General Electric and Trapper protested an August 5, 1987, BLM notice of proposed readjusted terms and conditions, contending first that the leases were "next subject to readjustment on June 1, 1998, not June 1, 1988." General Electric and Trapper also objected generally to the imposition of FCLAA-mandated terms and conditions on pre-FCLAA

leases and specifically to various proposed readjusted terms and conditions. In its November 1987 decision, BLM denied the protest of General Electric and Trapper to the August 1987 BLM notice, again concluding that it was proper to readjust coal leases C-07518 and C-07519 on June 1, 1988. BLM also overruled all of the objections raised in the protest. Attached to the November 1987 BLM decision were executed copies of a "Coal Lease Readjustment" for both coal leases, effective June 1, 1988.

[1] This case raises the question of whether a coal lease whose initial 20-year period for readjustment expired after passage of section 6 of FCLAA on August 4, 1976, but was not then readjusted, thereafter becomes subject to readjustment at 10-year intervals, in accordance with that statute. The Board addressed that same question in Franklin Real Estate Co., 93 IBLA 272 (1986). We concluded that when the 20-year period expired after August 4, 1976, the coal lease "automatically converted to a 10-year readjustment schedule," in accordance with the intent of Congress in passing section 6 of FCLAA. Franklin Real Estate Co., supra at 280. We based that conclusion on the words of Representative Patsy T. Mink, Chairman of the Subcommittee on Mines and Mining of the House Committee on Interior and Insular Affairs and one of the chief sponsors of H.R. 6721, which ultimately became FCLAA. She had stated that existing leases would be unaffected by the bill "'except to the extent its provisions are made applicable upon the periodic 10-year readjustment of lease terms.'" Franklin Real Estate Co., supra at 279 (quoting from 122 Cong. Rec. 489 (1976)) (emphasis omitted). We found that her statement was a "clear expression of Congressional intent that pre-FCLAA leases be subjected to the periodic ten-year readjustment of lease terms." Franklin Real Estate Co., supra at 279. Judicial review of that decision was not sought.

In their statements of reasons for appeal (SOR), appellants' principal argument is that Franklin was erroneously decided. They contend that the 20-year readjustment intervals originally set forth in section 3(d) of appellants' leases are terms and conditions of the existing leases which must be modified by a valid readjustment. To hold that section 6 of FCLAA itself modified that part of the lease terms and conditions, they argue, is not consistent with congressional intent, breaches the existing lease terms and conditions, is arbitrary, capricious, and an abuse of discretion, and constitutes an unconstitutional taking of property and a violation of due process. Appellants conclude that, having failed to readjust appellants' leases as of the expiration of the initial 20-year period as a result of the decision in Kaiser Steel, BLM must now wait until June 1, 1998, i.e., the expiration of the second 20-year period following issuance of the leases, at which time BLM may properly readjust lease terms and conditions, including that affecting the extent of subsequent readjustment periods.

After carefully reviewing appellants' arguments and our decision in Franklin, we are not persuaded that Franklin was erroneously decided. Thus, we conclude that, following passage of FCLAA, appellants' leases automatically became subject to readjustment at the end of each 10-year period following the end of the initial 20-year readjustment period. That occurred by operation of law. It is immaterial that BLM was not able to readjust

the terms and conditions of appellants' leases at the end of the initial 20-year period as a result of the decision in Kaiser Steel. 3/

Our interpretation of the effect of section 6 of FCLAA on readjustment intervals is consistent with implementing Departmental regulations issued following passage of FCLAA. As noted by the Solicitor, prior to the expiration of the initial 20-year readjustment periods of appellants' leases, the Department had promulgated 43 CFR 3522.2-1(b) (41 FR 56646 (Dec. 29, 1976)), which stated that: "All coal leases will be subject to readjustment at the end of the first 20-year period following the issuance of the lease and at the end of each ten-year period thereafter." This regulation was in effect at the time of the expiration of the initial 20-year periods of appellants' leases. As the Solicitor points out, the regulation "did not distinguish between leases issued before and after FCLAA" (Answer at 5). Also, the regulatory language indicates that the Department regarded the statutory provision for 10-year readjustment intervals as taking effect, with respect to pre-FCLAA leases already in their "first 20-year period," at the expiration of that period. 4/

The regulation was modified slightly in 1979 (44 FR 42635 (July 19, 1979)). The modification, as carried through to the present regulation, 43 CFR 3451.1(a)(1), specifically applies to leases "issued prior to August 4, 1976" and in that context provides for readjustment "at the end of the current [whether the initial or succeeding] 20-year period and at the end of each 10-year period thereafter." Thus, the modification merely

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3/ Appellants note, however, that, following the Board's decision in Kaiser Steel setting aside BLM's attempted readjustment of appellants' leases after the expiration of their initial 20-year periods, BLM issued an Aug. 3, 1982, notice to Utah International, which stated that "the terms and conditions of coal lease C-07518 and C-07519 remain as issued effective June l, 1958." Thus, appellants argue that BLM's July 1986 decision unilaterally vacated that notice, thereby violating appellants' "due process rights" (SOR at 13). Appellants' argument is clearly based on the premise that, by virtue of its July 1986 decision, BLM itself had changed the readjustment interval. However, as noted infra, that occurred by operation of law at the expiration of the initial 20-year readjustment periods of appellants' leases. Moreover, we note that the August 1982 notice, to which appellants refer, itself stated that the leases would be "subject to readjustment on June 1, 1988."

4/ Appellants argue at some length regarding the applicability of the Department's July 19, 1979, modification of 43 CFR 3522.2-1(b) (41 FR 56646 (Dec. 29, 1976)), which became 43 CFR 3451.1(a)(1) (44 FR 42635 (July 19, 1979)). They contend that the modification itself improperly imposed a 10-year readjustment interval on appellants' leases, which were then in their second 20-year readjustment period. Appellants ignore, however, the fact that the applicable regulation in effect at the time of expiration of the initial 20-year periods of the leases (43 CFR 3522.2-1(b)) reflected the Department's interpretation of the effect of the statute.

recognized that some coal leases were in a subsequent 20-year period at the time of passage of FCLAA.

At all pertinent times relating to the leases in question, the regulations provided for the 10-year readjustment interval. Moreover, as we held in Franklin, the 10-year readjustment period was imposed by the statute itself.

For these reasons and in accordance with our decision in Franklin, we conclude that, in its July 1986 and November 1987 decisions, BLM properly denied appellants' protests challenging BLM's conclusion that coal leases C-07518 and C-07519 became subject to the readjustment of terms and conditions on June 1, 1988, which was 10 years after the expiration of the initial 20-year period following issuance of the leases.

Next, we turn to appellants' objections to BLM's proposed readjustment of the actual terms and conditions of coal leases C-07518 and C-07519. We note that appellants admit in their SOR filed in IBLA 88-156 that virtually all of the arguments raised by them therein have been rejected in prior Board decisions and by the Tenth Circuit Court of Appeals in FMC Wyoming Corp. v. Hodel, 816 F.2d 496 (10th Cir. 1987), cert. denied, 108 S. Ct.
772 (1988), and Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987). Nevertheless, appellants assert that they are presenting these arguments in order to preserve them for a possible appeal in the United States District Court for the District of Columbia. Appellants state that several cases are presently pending in that court which present the same or similar arguments. Appellants assert that court is not bound by the opinions of the Tenth Circuit Court of Appeals. We perceive no need to address those arguments previously considered and rejected by the Board. However, we will discuss two additional arguments raised by appellants.

Appellants argue that they are entitled to have the case remanded to BLM for a determination pursuant to 43 CFR 3473.3-2(a)(3) whether "conditions warrant" a royalty rate less than 8 percent for coal mined by underground methods, in accordance with the court's opinion in Coastal States Energy Co. v. Hodel, supra. Departmental regulation 43 CFR 3473.3-2(a)(3) provides that BLM may set the royalty rate for coal mined by underground methods at an amount less than the minimum 8 percent, "but in no case less than 5 percent if conditions warrant." In Coastal States Energy Co. v. Hodel, supra, the court concluded that it was error for BLM to automatically set a readjusted royalty rate at 8 percent for coal mined by underground methods where 43 CFR 3473.3-2(a)(3) permits a "lesser amount," and, accordingly, remanded the case for further proceedings, including a determination whether a lesser amount was warranted in that case.

BLM stated in its November 1987 decision, at page 3: "Coal leases C-07518 and C-07519 contain both surface and underground coal reserves. The lessee currently is mining only surface coal, however, and its mine permit package presently contains no definite proposal for mining the underground reserves." See also SOR (IBLA 88-156) at 2. Appellants do not challenge

BLM's statement. 5/ BLM properly set the readjusted royalty rate for coal mined by underground methods at 8 percent and we decline to remand the case to BLM for a determination whether a lesser amount is warranted. See Ark Land Co., 97 IBLA 241, 247 (1987).

Appellants also object to section 10 of their readjusted leases to the extent it provides that the lessee "shall, prior to the termination of bond liability or at any other time when required and in accordance with all applicable laws and regulations, reclaim all lands the surface of which has been disturbed." Appellants contend that this section makes termination of bond liability contingent on reclamation, in violation of regulatory provisions which state that a lease bond does not cover reclamation obligations. Specifically, they cite 43 CFR 3474.2(a) which provides that a lease bond, which is generally conditioned upon compliance with all lease terms and conditions, "shall not cover reclamation within a permit area." 6/ Appellants state that the language in section 10 of the readjusted leases effectively requires double bonding for reclamation obligations where reclamation is already subject to a permit and performance bond under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), as amended, 30 U.S.C. || 1201-1328 (1982). Appellants request that the offending language be deleted.

In its November 1987 decision, BLM stated that a lease bond is "not held as additional security for reclamation of the permit area" (Decision at 3). Thus, BLM declined to delete the language in section 10 of the readjusted leases, concluding that it applies "to all lease areas not included in the mine permit area." Id. Accordingly, BLM overruled appellants' objections to the language in section 10 of appellants' readjusted leases governing termination of bond liability.

[2] Land which may be disturbed under a coal lease is not necessarily coextensive with the area either permitted or bonded pursuant to SMCRA. See 44 FR 42607 (July 19, 1979) ("The lease bond * * * covers potential damage to surface resources and values on a lease * * * outside a permit area on a lease.") In particular, section 509(a) of SMCRA, 30 U.S.C. | 1259(a) (1982), only requires that a performance bond "cover that area of land within the permit area upon which the operator will initiate and conduct surface coal mining and reclamation operations" and upon which succeeding increments of such operations will be initiated and conducted. Thus, it is permissible for BLM to make termination of liability under a

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5/ On Feb. 5, 1987, appellants withdrew an application to modify coal lease C-07518. See Letter to BLM from counsel for appellants, dated Feb. 3, 1987. That application had sought to include additional land in the lease for surface facilities so that underground mining could begin on coal lease C-07518. See Letter to BLM from Utah International, dated Sept. 14, 1977.

6/ Appellants also cite 43 CFR 3400.0-5(s) which defines the term "lease bond" to mean the bond given "to assure that all aspects of the mining operation other than reclamation operations under a permit on a lease are conducted in conformity with the approved mining or exploration plan."

lease bond contingent on reclamation of land not subject to a SMCRA permit and performance bond, where such land may have been disturbed by the lessee. This is not precluded by 43 CFR 3474.2(a), which constrains a lease bond from covering only "reclamation within a permit area." (Emphasis added.) However, we also recognize that the language in section 10 of appellants' readjusted leases may be interpreted as being more expansive because it makes termination of bond liability contingent on reclamation of "all lands the surface of which has been disturbed." This could make termination of bond liability in part contingent on reclamation of leased land which is already subject to a SMCRA permit and performance bond, and arguably might violate 43 CFR 3474.2(a) which precludes a lease bond from covering reclamation within a permit area and which was intended to avoid "dual bonding" (43 FR 41682 (Sept. 18, 1978)). See Coastal States Energy Co., 94 IBLA 352, 357-58 (1986).

However, we find no reason to strike the language in question. BLM has represented that the language applies to those lease areas not included in the mine permit area. We find that that representation is binding on BLM. Moreover, we note that 43 CFR 3474.3(b)(2) and 30 CFR 740.15(a) provide mechanisms for BLM, on its own or at the instigation of a lessee, to correct a situation of double bonding for reclamation obligations, in order to avoid a conflict with 43 CFR 3474.2(a). Departmental regulation 43 CFR 3474.3(b)(2) provides that: "After consultation with the Surface Mining Officer, the authorized officer may release the amount of any outstanding bond which is related to, and is not necessary to secure, the performance
of reclamation within a permit area." In promulgating the predecessor of 43 CFR 3474.3(b)(2), which contained virtually identical authority, the Department explained:

> The lease bond will not duplicate the reclamation performance bond; the final rulemaking contains an express provision in | 3474.3(b) for adjusting existing lease bonds to assure that
> the two bonds operate in a wholly complementary manner. In fact, new subsection 3474.3(b) provides that the lease bond amount may be reduced by elimination of coverage of reclamation obligations.

44 FR 42607 (July 19, 1979). Also, 30 CFR 740.15(a) provides that:

> (1) Each holder of a Federal coal lease that is covered by a Federal lease bond required under 43 CFR Part 3474 may apply to the authorized officer for release of liability for that portion of the Federal lease bond that covers reclamation requirements.
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> (2) The authorized officer may release the liability for that portion of the Federal lease bond that covers reclamation requirements if:
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> (i) The lessee has secured a suitable performance bond covering the permit area under this part;
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> (ii) There are no pending actions or unresolved claims against existing bonds; and

(iii) The authorized officer has received concurrence from OSM and the Bureau of Land Management.

Thus, where, at the time of readjustment, leased land is already subject to a SMCRA permit and performance bond or where, following the time for readjustment, leased land becomes subject to a SMCRA permit and performance bond, the lessee may request a release of or BLM may on its own release the lessee's lease bond liability to the extent it covers compliance with reclamation obligations within a permit area. Such a release will bring the lease bond itself fully into compliance with 43 CFR 3474.2(a). We affirm BLM's November 1987 decision to the extent BLM overruled appellants' objections to section 10 of the readjusted leases.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Bruce R. Harris
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge